STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COVINA UNIFIED EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-3177
v.	)	PERB Decision No. 968
COVINA-VALLEY UNIFIED SCHOOL DISTRICT,	)	January 20, 1993
Respondent.	)	

Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for Covina Unified Education Association, CTA/NEA; Gibson, Dunn & Crutcher by Kenneth W. Anderson, Attorney, for Covina-Valley Unified School District.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Covina Unified Education Association, CTA/NEA (Association) of a Board agent's partial dismissal (attached hereto) of the Association's unfair practice charge. The Association alleged that the Covina-Valley Unified School District had violated section 3543.5(b) and (e) of the Educational Employment Relations Act (EERA)[1] by refusing to

1/EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (e) Refuse to participate in good faith in

participate in good faith in the impasse procedure.

The Board has reviewed the Board agent's warning and partial dismissal letters, and finding them to be free of prejudicial error, adopts them as the decision of the Board itself.

ORDER

The Board hereby AFFIRMS the Board agent's partial dismissal in Case No. LA-CE-3177.

Member Caffrey joined in this Decision.

Chairperson Hesse's concurrence/dissent begins on page 3.

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the impasse procedure set forth in Article 9 commencing with Section 3548) .

HESSE, Chairperson, concurring and dissenting: With the exception of one allegation, I concur with the Public Employment Relations Board's (PERB or Board) affirmance of the partial dismissal of the unfair practice charge in Case No. LA-CE-3177.

The issue presented to the Board in a case involving an appeal from a dismissal of a charge is whether the charge states facts, which if true,[1] establish a prima facie case. Here, the second amended charge alleges that the District was not permitted by a provision in the collective bargaining agreement to adopt its last, best and final offer. The Board agent reviewed the contract provision and citing Speedrack. Inc. (1989) 293 NLRB 1054 [131 LRRM 1347] concluded that there was no "clear agreement" that the Covina Valley Unified School District (District) could not implement its final offer.

Board agents are not empowered to judge the merits of the charging party's case or to resolve disputed facts relating to contract interpretation. (Saddleback Community College District (1984) PERB Decision No. 433.) The contract interpretation and the determination of whether a violation of the law occurred is a finding appropriately made only after an evidentiary hearing.

With respect to the allegation contained in the charge that relates to the District's adoption of its last, best and final offer, I would reverse that portion of the dismissal and order that the matter be remanded to the PERB General Counsel for issuance of a complaint.

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[1]See San Juan Unified School District (1982) PERB Decision No. 204.

STATE OF CALIFORNIA PETE WILSON, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

June 24, 1992

Charles R. Gustafson, Staff Counsel
California Teachers Association
P.O. Box 92888
Los Angeles, CA 90009

Re: PARTIAL DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. LA-CE-3177, Covina Unified Education Association, CTA/NEA v. Covina-Valley Unified School District

Dear Mr. Gustafson:

I indicated to you in my attached letter dated May 27, 1992, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to June 5, 1992, the charge would be dismissed.

On June 8, 1992, you filed a Second Amended Charge, amending only one previously-filed allegation: that the District failed to provide information on the Great-West medical plan. I am therefore dismissing all the other previously-filed allegations, based on the facts and reasons contained in my May 27 letter.

The Second Amended Charge also contains a brand new allegation: that the District's adoption of its last, best and final offer was unauthorized under the collective bargaining agreement. The allegation cites Article I, paragraph 4, of the agreement, which provides as follows:

> The Association shall have the right by serving notice upon the District in writing prior to January 1, 1991 to reopen negotiations after January 1, 1991 with the District to seek to amend this Agreement effective on September 1, 1991 solely with respect to Article XVI, Health and Welfare Benefits, and Article XVII, Salaries. If the parties cannot reach agreement on such reopened matters, the impasse procedures of the California Government Code Section 3548-3548.4 shall be the sole recourse for resolving the impasse. [Emphasis added.]

You have told me that there is no relevant bargaining history or past practice with regard to this provision. You have also told me that the theory underlying the new allegation was first raised with the District on or about June 4, 1992, when unit members filed a grievance on the same theory. An Association "Impasse Bulletin" dated January 8, 1992, had acknowledged as a possible "worst scenario" that the District "would unilaterally impose the fringe benefit package which they've proposed from the start."

Based on the facts stated above, the new allegation does not state a prima facie case, for the reasons that follow.

There appears to be no EERA precedent directly on point, but PERB has held that after exhaustion of the impasse procedures "impasse under EERA is identical to impasse under the NLRA." Modesto City Schools (1983) PERB Decision No. 291, at p. 32. It is therefore appropriate to look to NLRA precedent.

Under the NLRA, it has been held that, in the absence of a clear agreement to the contrary, an employer's obligation to bargain over a reopened term carries with it the right to implement a final offer upon genuine impasse. Speedrack, Inc. (1989) 293 NLRB 1054 [131 LRRM 1347]: NKS Distributors. Inc. (1991) 304 NLRB No. 69 [139 LRRM 1226]; Local Union No. 47 v. NLRB (D.C. Cir. 1991) 937 F.2d 635 [137 LRRM 2723].

There appears to be no dispute in the present case that the District had an obligation to bargain the reopened terms and that there was a genuine impasse. The question therefore is whether or not there was a "clear agreement" that the District could not implement its final offer.

Article I, paragraph 4, of the agreement cannot be said be represent such a "clear agreement." In its reference to the statutory impasse procedures, it does not clearly exclude one of the normal outcomes of those procedures: the employer's right to implement. There appears to be no bargaining history or past practice to help establish that there was a "clear agreement" against implementation; on the contrary, the Association's slowness in raising the issue may suggest that not even the Association thought (prior to June 4, 1992) that there was such a "clear agreement." The new allegation is therefore also dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of certain allegations contained in the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal

(California Code of Regulations, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Code of Regulations, title 8, section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party of filed with the Board itself. (See California Code of Regulations, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Code of Regulations, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JOHN W. SPITTLER
General Counsel

By Thomas J. Allen
Thomas J.Allen
Regional Attorney

TJA:lgf

Attachment

cc: Kenneth W. Anderson

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

May 27, 1992

Charles Gustafson
California Teachers Association
P.O. Box 92888
Los Angeles, CA 90009

Re: WARNING LETTER, Unfair Practice Charge No. LA-CE-3177
Covina Unified Education Association CTA/NEA v. Covina-Valley Unified School District

Dear Mr. Gustafson:

In the above-referenced charge, the Covina Unified Education Association, CTA/NEA (Association) alleges that the Covina-Valley Unified School District (District) refused to participate in good faith in the impasse procedure. This conduct is alleged to violate Government Code sections 3543.5(b) and (e) of the Educational Employment Relations Act (EERA).

My investigation of this charge reveals the following facts.

The Association and the District are parties to a collective bargaining agreement effective through August 31, 1992. The "Health and Welfare Benefits" article (Article XVI) requires the District to provide (among other plans) "Medical Insurance (optional participation—three plans presently available)," with the District to contribute the employee-only premium up to a specified maximum. The "Agreement" article (Article I) gives the Association the right to reopen the "Health and Welfare Benefits" article each year.

The Association reopened the "Health and Welfare Benefits" article for the 1991-92 school year. The Association proposed in part to replace the District's Great-West medical insurance plan with a PERS Care plan. The District proposed to replace the Great-West plan with a CIGNA PPO plan. The District also had a CIGNA HMO plan and a Kaiser plan.

Impasse was determined on September 17, 1991. The mediator certified the matter for factfinding on December 13, 1991. Factfinding was conducted in January, February and March 1992, and a factfinding report was issued on March 20, 1992. The chairperson recommended that the Great-West plan remain in effect. The Association panel member concurred; the District panel member dissented. On April 13, 1992, the parties held a post-factfinding meeting, at which the District ultimately

informed the Association that effective June 1, 1992, it would implement the CIGNA PPO, as proposed in its last, best and final offer.

The Association alleges that the implementation of the District's last, best and final offer is unlawful because the District allegedly did not participate in the impasse procedures in good faith. The Association alleges four examples of the District's alleged bad faith:

1. An alleged unilateral change in the CIGNA HMO plan on or about March 1, 1992.

On or about March 1, 1992, employees enrolled in the CIGNA HMO plan received new identification cards that indicated that the cost of office visits would increase from $4 to $5 and the cost of non-generic drugs would increase from $2 to $5. The District denied knowledge of the changes. On March 27, 1992, the District obtained from CIGNA a letter stating that the release of the cards was in error and did not reflect changes applicable to employees in the unit. The District notified employees of the letter from CIGNA. In a bulletin dated April 2, 1992, the Association acknowledged the "error" and the District's "immediate response." The Association now states, however, that the problem has not yet been corrected and that employees are still being charged the increased amounts. The District states that the problem is now being corrected and that new cards are being sent out.

2. An alleged failure to provide information on the Great-West plan and the CIGNA PPO plan.

In late August 1991, the Association asked the District for information on the CIGNA PPO plan. The District stated that it had "no plan information." On November 26, 1991, the Association asked CIGNA for a copy of the plan but was told that "nothing had been prepared." On or about December 11, 1991, the Association asked the District for the existing Great-West contract and the 1991-92 CIGNA PPO plan. In a letter dated December 16, 1991, the District stated that the existing Great-West contract was provided on December 13, 1991, but that "no contract or records are available" for the 1991-92 CIGNA PPO plan.

On February 11, 1992, the Association requested a copy of the CIGNA PPO plan. In a letter dated February 13, 1992, the District stated that "no formal plan exists" but that it was enclosing the materials provided to employees outside the unit who enrolled in the plan.

On April 23, 1992, the Association requested the Great-West master contract. On May 7, 1992, the District responded that the Great-West master contract had been provided on December 13, 1991. The District also stated that the CIGNA PPO master contract "won't be available for some time yet." On May 18, 1992, the Association replied that it had not been provided the Great-West master contract and requested it again. The Association also characterized as "bewildering" the District's "inability to fulfill our request for [CIGNA PPO] plan information."

3. An allegedly prejudicial submission to the factfinding panel.

At the evidentiary factfinding hearing on February 18, 1992, the District panel member allegedly stated that the District panel would not be raising an inability-to-pay defense. The allegation cites the factfinding report, which states in part as follows:

> The [D]istrict does not contend it lacks the financial ability to bear such a cost for this school year. However, it does contend that for it to do so, on top of the cost of the step and column increases already granted retroactive to September 1, 1991, would be unwise and even fiscally irresponsible.

On March 13, 1992, the District panel member submitted to the panel a letter stating in part that since the evidentiary hearing the District's projected ending balance had slipped from $831,000 to $571,000. The District denied in the submission that it had substantial available monies to fund increased compensation. The Association alleges that this submission was in direct conflict with the District's statement at the evidentiary hearing, that its timing prevented the Association from refuting it, and that it "did prejudice" the chairperson. The panel members met again on March 17, 1992, before the report was issued (on March 20, 1992).

4. An alleged withdrawal of an offer of a "Section 125" plan.

On October 24, 1992, the District informed employees that a tax-saving "Section 125" plan had been discussed with the Association and would be "implemented around the first part of 1992 or as soon as practicable." In a memo dated October 31, 1991, the Association objected that the plan had not been agreed upon and stated, "Until the contract dispute is settled, contract language has been agreed upon, and Association members have had an opportunity to vote, no negotiable items may be implemented." The Association requested a retraction, and on November 6, 1991,

the District informed employees that it would "not allow any unit members to take advantage of this tax-saving plan until agreement is reached on all issues." According to the factfinding report, the Association had been "reluctant to accept the [D]istrict's proposal because under the [D]istrict's Section 125 plan, the teacher's preferred provider option would have been limited to the [D]istrict's proposed C[IGNAJ PPO." As the Association itself told its members on November 6, 1991, "the District management team refused to negotiate any issues separately."

On February 27, 1992, and March 17, 1992, the District allegedly withdrew its offer and conditioned any establishment of a "Section 125" plan upon the Association's agreement to the District's total fringe benefit proposal. The allegation cites the District panel member's dissenting opinion, which states that the District did not implement the plan in view of the Association's objection but that the plan continued to be available with the inclusion of the CIGNA PPO plan.

Based on the facts stated above, the charge does not state a prima facie violation of the EERA, for the reasons that follow.

1. Alleged unilateral change of March 1, 1992. The undisputed documentary evidence shows only an error on the part of CIGNA. It does not show any policy change attributable to the District.

2. Alleged failure to provide information. The undisputed documentary evidence shows that the District responded to each request for information, although sometimes by stating that the requested information was unavailable. There appears to be a dispute about whether or not the District actually provided a copy of the Great-West contract on December 13, 1991, as the District stated in its letter of December 16, 1991, but there is no allegation or evidence that the Association questioned the adequacy of the District's response at that time. When the Association requested the contract again (on April 23, 1992, and May 18, 1992), factfinding was over.

3. Allegedly prejudicial submission. The undisputed documentary evidence does not show that the District was inconsistent in maintaining that, although it was not "unable to pay," it also did not have "substantial available monies." To regard the District's submission of March 13, 1992, as "prejudicial" seems unjustified, since the factfinding panel met once again before the report was issued, and the Association panel member (presumably unprejudiced) ultimately concurred with the report. Furthermore, there appears to be no authority for the proposition that a mere submission of argument and information can evidence bad faith.

4. Alleged withdrawal of offer. The undisputed documentary evidence shows either (1) that the District's offer of a "Section 125" plan was always conditioned upon a wider agreement or (2) that if and when the District offered the "Section 125" plan unconditionally the Association rejected it. The documentary evidence does not show that the District bargained regressively.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 5. 1992. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Thomas J. Allen

Thomas J. Allen
Regional Attorney

TJA:lgf